

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PAUL G. MAST,

Plaintiff and Appellant,

v.

THE JUDGES' RETIREMENT
SYSTEM,

Defendant and Respondent;

BETTY YEE, as State Controller,

Real Party in Interest.

B289043

(Los Angeles County
Super. Ct. No. BS169193)

APPEAL from a judgment of the Superior Court of
Los Angeles County, James C. Chalfant, Judge. Affirmed.

Paul G. Mast for Plaintiff and Appellant.

Reed Smith, Harvey L. Leiderman and Jeffrey R. Rieger,
for Defendant and Appellant.

No appearance for Real Party in Interest.

Paul G. Mast, a retired municipal court judge, appeals the superior court's February 22, 2018 declaratory judgment confirming that the Judges' Retirement System (JRS) must continue to pay benefits to Mast according to the terms of a 1996 settlement agreement between Mast and JRS and finding that Mast was not entitled to any additional sums he sought from JRS in his lawsuit. Mast contends the court violated the doctrine of collateral estoppel (issue preclusion) by redetermining the issue of his right to arrearages and future benefits previously decided in his favor by the Board of Administration (Board) of the California Public Employees' Retirement System (CalPERS), the administrator of JRS, and committed several prejudicial procedural errors in reaching its decision. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Original Dispute Concerning Cost-of-living
Adjustments to Mast's Judicial Retirement Benefits*

The retirement allowance of a retired judge is generally based on a fixed percentage of the salary payable to the judge holding the particular judicial office to which the retired judge was last elected or appointed.¹ Mast served on the Orange County Municipal Court, Central District, from November 8, 1965 until his retirement from the bench on January 15, 1979. He elected to receive deferred retirement benefits and became

¹ The percentage is equal to 3.75 percent multiplied by the number of years of service to which the retired judge is entitled to be credited, not to exceed 20 years. (See Gov. Code, §§ 75033.5 [applicable to judges first elected or appointed to judicial office before November 9, 1994], 75522, subd. (d) [applicable to judges first elected or appointed to judicial office on or after November 9, 1994].)

eligible to start receiving those benefits from JRS on May 28, 1995, his 63d birthday. Based on his 13-plus years of service, Mast is entitled to benefits calculated at 49.4572 percent of the benchmark salary for his judicial office. Mast's dispute with JRS concerns the proper calculation of that benchmark salary.

a. *Olson v. Cory and the cap on cost-of-living increases*

Prior to a 1976 amendment to former Government Code section 68203, effective January 1, 1977, judges' salaries were increased each year by the amount of increase in the California consumer price index (CPI) as reported by the California Department of Industrial Relations. The 1976 amendment attempted to maintain judicial salaries at their September 1, 1976 levels and then to limit prospective increases beginning on July 1, 1978 to 5 percent, regardless of the actual increase in the California CPI.

In *Olson v. Cory* (1980) 27 Cal.3d 532 the Supreme Court held imposition of the 5 percent limit on annual salary increases impaired the vested rights of sitting judges when applied to a judicial term that began before January 1, 1977. (*Id.* at p. 540.) However, the Court held the salary for a judge serving a term that began after January 1, 1977 was properly subject to the 5 percent limit. (*Ibid.*) The Court also held the legislation impaired the vested rights of retired judges: "Judicial pensioners whose benefits are based on judicial services terminating while [former Government Code] section 68203 provided for unlimited cost-of-living increases in judicial salaries, acquired a *vested* right to a pension benefit based on some proportionate share of the salary of the judge or justice occupying the particular judicial office including the incumbent judge's or justice's unlimited cost-of-living increases." (*Id.* at p. 542.)

b. *Mast's contention regarding his salary benchmark and the October 1996 settlement agreement*

Prior to receiving any retirement benefits, Mast contacted JRS to determine the amount of his prospective retirement benefits and was advised his salary benchmark would be based on the current salary of the judge holding the judicial office from which he had retired (that is, the current salary of a judge serving a term that began after January 1, 1977). Mast disagreed with that position, asserting, because he had retired from a judicial term that began before January 1, 1977, his salary benchmark should be his own last salary with annual cost-of-living increases, measured by the applicable CPI, without the 5 percent limit invalidated in part in *Olson v. Cory, supra*, 27 Cal.3d 532.

Mast and JRS resolved their dispute by entering a settlement agreement in October 1996. That agreement provided, in part, JRS would “re-calculate Mast’s allowance based on the definition in former Government Code section 68203, as in effect on January 6, 1975, the date his last term began, and based on the compensation he was entitled to on the date of his retirement, January 15, 1979, pursuant to *Olson v. Cory* (1980) 27 Cal.3d 532.” That is, JRS agreed to calculate Mast’s retirement allowance by applying unlimited annual cost-of-living increases, based on the California CPI, to the hypothetical salary Mast would have received had he continued serving on the bench until May 1995.²

² This approach to calculating retirement benefits for judges who had retired while serving a term in office when former Government Code section 68023 provided for unlimited cost-of-living increases was considered by the court of appeal in

Pursuant to the terms of the settlement agreement, JRS recalculated the amount of Mast's retirement benefit starting on January 1, 1997. In mid-1997 JRS determined it had miscalculated and corrected the amount of benefits that should have been paid starting January 1, 1997. This corrected figure was thereafter used as the starting point for further cost-of-living adjustments.

2. The Renewed Dispute Concerning Mast's Benefits

After several years without further controversy, Mast began writing JRS, asserting it was miscalculating the annual cost-of-living adjustment to his benchmark salary and requesting that JRS pay the deficiencies in his retirement allowance. In 2010 Mast filed a claim with JRS for unpaid retirement benefits.

Following an extensive exchange of correspondence, on May 4, 2011 JRS wrote Mast and denied his request for an increase to his monthly allowance and his claim for unpaid retirement benefits. In addition, in her letter CalPERS manager Pamela Montgomery explained, when JRS had recalculated his allowance following the October 1996 settlement agreement, JRS staff inadvertently applied a 9 percent cost-of-living adjustment to the September 1987 salary figure rather than the actual

Staniforth v. Judges' Retirement System (2014) 226 Cal.App.4th 978. The *Staniforth* court, applying the Supreme Court's holding and analysis in *Olson v. Cory, supra*, 27 Cal.3d 532, held benefits for retired judges "remained tethered to the salaries paid to actual (rather than hypothetical) active jurists." (*Staniforth*, at p. 989.) Thus, retirement benefits for those judges were exempted from the amendment to former section 68203 only to the extent the salaries for active judges serving in their offices were temporarily exempted. (*Staniforth*, at p. 989.)

1.9 percent cost-of-living adjustment, resulting in a 7 percent increase to salary that should not have been applied. Accordingly, JRS argued Mast had been overpaid, not underpaid as he asserted.

Mast notified JRS he was appealing the May 4, 2011 denial of his claims for arrearages and additional future benefits. Before the administrative appeal was processed, JRS advised Mast it intended to seek a reduction in his retirement benefits to eliminate the cost-of-living adjustments and thereby bring it into compliance with *Olson v. Cory*, *supra*, 27 Cal.3d 532.

3. *The Decision of the CalPERS Board of Administration*

After an initial hearing and briefing an administrative law judge issued a proposed decision finding the October 1996 settlement agreement was void and JRS should pay Mast only the amounts it would pay any other retired judge in the same situation (that is, based on the service-determined percentage of the current salary of the judge holding the particular judicial office that had been held by the retired judge). The CalPERS Board remanded the case for the administrative law judge to take additional evidence on the issue whether JRS could recoup overpayments that may have been made to Mast.

Following further proceedings the administrative law judge issued a proposed decision on remand, holding the October 1996 settlement agreement should not be prospectively enforced; JRS should pay Mast as it would other retired judges; and JRS was not entitled to adjust Mast's future retirement allowances to recover overpayments made pursuant to the settlement agreement. The Board declined to adopt the proposed decision and ordered a full board hearing on the matter.

In its formal statement of issues for the full board hearing, JRS asserted, “Since entering into the Settlement Agreement, the JRS has calculated Mast’s retirement allowance by applying annual cost of living increases, based on California Consumer Price Index, to Mast’s last judicial salary to set the benchmark for calculating his retirement allowance. This interpretation of the Settlement Agreement was always, and is still, in error because the Settlement Agreement requires JRS to calculate Mast’s retirement allowance ‘pursuant to *Olson v. Cory* (1980) 27 Cal.3d 532,’ not contrary to the decision. As previously explained, *Olson v. Cory* does not support applying annual cost of living increases to Mast’s last judicial salary to set the benchmark for calculating his retirement allowance. . . .”

In light of this contention and JRS’s continuing alternative argument that, if interpreted to permit unlimited cost-of-living increases, the settlement agreement was void as against public policy, the Board identified five issues for determination in the administrative appeal: (1) whether Mast is entitled to receive a retirement allowance under the terms of the settlement agreement that is greater than that permitted under the Judges’ Retirement Law and cases interpreting it, including *Olson v. Cory, supra*, 27 Cal.3d 532, and, if so, in what amount; (2) whether if the answer to question 1 is “yes,” the settlement agreement is void against public policy; (3) whether Mast had breached his agreement to keep the terms of the settlement agreement confidential; (4) whether JRS entitled to offset future payments to recover any overpayments it may have made to Mast; and (5) “[w]hether the JRS owes [Respondent] any amounts for alleged past underpayments and, if so, how much the JRS owes [Respondent].”

When CalPERS initiates the process to discontinue a benefit, the Board explained in its March 15, 2017 final decision, it has the burden of proving the propriety of doing so. When CalPERS modifies a member's benefits and the member appeals that decision, CalPERS has the burden of producing evidence to support its determination, but the appealing member has the burden of proof that the determination was incorrect. The standard of proof is preponderance of the evidence.

Using these guidelines with respect to JRS's assertion the settlement agreement was void, the Board concluded, "JRS did not meet its burden in establishing the settlement agreement is unenforceable under the law and that Respondent's retirement allowances should be corrected. Respondent established that JRS is legally required to uphold the terms of the settlement agreement." Accordingly, the Board ordered, "The 1996 settlement agreement between JRS and Respondent shall continue to govern the calculation of retirement benefits for Judge Paul Mast."

4. *Mast's Petition for Writ of Mandate and Complaint for Declaratory Relief; the Superior Court's Decision*

In a letter dated March 30, 2017, JRS advised Mast that the Board's March 15, 2017 final decision "found only that the settlement agreement is enforceable; it did not find that you are entitled to \$362,424 in retroactive retirement benefits and interest, as you contend." JRS further stated Mast's monthly retirement allowance beginning April 30, 2017 would be increased to \$8,298.17, not \$9,593.69 as Mast contended it should be. Finally, JRS explained it would make a one-time adjustment, to be included with his April 30, 2017 payment, that would "restore your allowance to what it would have been if JRS had

not reduced your retirement allowance effective with your April 2016 payment.”

Mast responded to JRS’s position on April 10, 2017 by filing a verified petition for writ of mandate, verified petition for writ of administrative mandate and complaint for declaratory relief.³ In his first cause of action for a writ of mandate, Mast alleged the Board’s final decision rejected JRS’s contentions that Mast’s calculations were in error and should be disregarded and that JRS should be allowed to recalculate the benefits in some other manner. Mast’s position, as made clear in subsequent filings, was that JRS’s determination of his benchmark salary as of January 1, 1997, whether or not based on a calculation error by JRS staff, was effectively incorporated into the parties’ settlement agreement and, pursuant to the Board’s final decision, was now binding on JRS.⁴ Accordingly, Mast argued JRS had a ministerial duty to pay Mast in accordance with his calculations of arrearages and future benefits.

In his second cause of action for writ of administrative mandate, Mast simply explained he was not challenging the validity of the Board’s final decision, but rather the refusal of JRS to follow that decision.

³ Mast named Betty Yee, the state controller, as real party in interest.

⁴ As part of its factual findings in its final decision, the Board quoted Montgomery’s May 4, 2011 letter in which she explained that, in computing Mast’s benchmark salary following the October 1996 settlement agreement, JRS staff had inadvertently applied a 9 percent cost-of-living adjustment, rather than a 1.9 percent adjustment, to the September 1987 salary figure.

In his third cause of action for declaratory relief, Mast alleged an actual controversy existed between Mast and JRS “as to whether JRS owes unpaid benefits.” Mast requested a judicial determination that unpaid retirement benefits are owed by JRS as shown on the accounting attached as an exhibit to his petition and complaint.

In its answer JRS admitted there existed an actual controversy regarding the amounts JRS must pay Mast.

After receiving briefing from the parties, as well as declarations from Mast and from Montgomery on behalf of JRS, the superior court on January 30, 2018 issued its decision granting declaratory relief in favor of JRS: “A declaratory judgment shall issue that JRS must pay Mast’s retirement benefits pursuant to the Settlement Agreement based on a corrected COLA [cost-of-living adjustment] from 1996, and that Mast is not entitled to payment of a past underpayment.”

Mast’s position, the court stated, was that the Board’s final decision had not only ordered JRS to continue to use the 1996 settlement agreement to calculate his retirement benefits but also approved the accounting for unpaid benefits Mast submitted as part of the administrative process. But, the court emphasized, the Board’s final decision did not order JRS to pay Mast the unpaid retirement benefits he claimed.

Looking to the Board’s statement of the five issues before it, the court explained the Board clearly decided JRS had not established that the settlement agreement was void (issue 2) or should be corrected to permit recovery of overpayments by JRS

(issues 1 and 4),⁵ and implicitly decided that Mast had not breached the agreement's confidentiality clause (issue 3). However, the conclusion JRS was required to uphold the terms of the settlement agreement did not address the remaining issue (issue 5), whether JRS owed Mast any sums for unpaid retirement benefits and, if so, how much.⁶ Because the Board's final decision did not address the actual calculation of Mast's retirement benefits, the issue was properly before the court.

Turning to that question, the court pointed out that Mast's accounting materials began with 1997 and did not address the 9 percent cost-of-living-adjustment error described by JRS. The court concluded, "By relying solely on the Board's decision and not rebutting JRS's evidence that he benefited from a clerical error in the 1996 COLA calculations, Mast has not met his burden of showing that he is entitled to a past underpayment."

On February 22, 2018, after additional motion practice, the superior court entered its Declaratory Judgment, which stated, in part, "The JRS shall continue to pay Mast according to the terms of the settlement agreement Mast is not entitled [to] receive any of the additional amounts he seeks from the JRS by this

⁵ The court noted that JRS contended Mast had been overpaid by approximately \$95,000.

⁶ The court suggested the Board may have incorrectly believed its determination that Mast was not required to repay sums other retired judges had not received mooted any claim by Mast for arrearages.

action. This declaration constitutes final judgment in favor of the JRS and against Mast in this action.”⁷

DISCUSSION

1. *The Superior Court Did Not Redetermine an Issue Previously Decided by the CalPERS Board*

Mast’s principal contention on appeal is that the issue whether JRS could correct the staff mistake in using a 9 percent, rather than a 1.9 percent, cost-of-living adjustment in computing his 1997 benchmark salary had been litigated and finally decided in his favor by the Board. Accordingly, he argues, the superior court violated well-established principles of issue preclusion when it considered additional evidence and determined de novo his retirement benefits had not been underpaid as a result of JRS’s correction of that clerical error. (See *Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 867 “[i]t is settled that the doctrine of collateral estoppel or issue preclusion is applicable to final decisions of administrative agencies acting in a judicial or quasi-judicial capacity”].)

To support his position, Mast emphasizes the Board’s final decision quoted Montgomery’s May 4, 2011 letter describing the clerical error in calculating the cost-of-living adjustment for

⁷ In response to this court’s letter inquiring whether the superior court had issued a final ruling with respect to Mast’s verified petitions for writ of mandate and writ of administrative mandamus, JRS submitted a portion of the reporter’s transcript of proceedings on July 18, 2017 during which the parties agreed with the court that, because Mast was not contesting the Board’s decision, the matter should proceed only on his third cause of action for declaratory relief. Accordingly, we agree with the parties that the matter is properly before this court on appeal.

September 1987, but concluded JRS had not met its burden in establishing Mast's retirement allowances should be corrected. Mast's argument fundamentally misconstrues the Board's final decision.

As the Board explained in listing the issues before it for determination, the parties' dispute presented two distinct claims for possible "correction" of past payments to Mast: First, JRS contended it had overpaid Mast because the settlement agreement, properly interpreted, limited Mast to benefits consistent with the Supreme Court's decision in *Olson v. Cory*, *supra*, 27 Cal.3d 532 (issue 1) or was void in its entirety because it violated public policy (issue 2). Accordingly, the Board was required to decide whether, under either theory, JRS was entitled to recoup overpayments it had made through offsets to prospective payments (issue 4). Second, Mast argued he had been underpaid as a result of JRS's adjustment to the cost-of-living increases included in his 1997 benchmark salary. The Board was asked to decide if JRS owed Mast any sums for past underpayments (issue 5). JRS, the Board held, had the burden of proof on the first issue of correction because it was seeking to take away Mast's right to a benefit by asserting the settlement agreement was void. Mast, however, had the burden of proof on the second issue, which was Mast's appeal of the modification of his benefits as set forth in the May 4, 2011 letter.

The legal conclusion Mast cites to demonstrate he prevailed on the issue of underpayment before the Board does no such thing. The Board held, "JRS did not meet its burden in establishing that the settlement agreement is unenforceable under the law and that Respondent's retirement allowances should be corrected. Respondent established that JRS is legally

required to uphold the terms of the settlement agreement.” That legal conclusion addresses the Board’s claim there was an overpayment, not Mast’s claim of underpayment of benefits. As the superior court correctly found, nowhere does the Board’s final decision address Mast’s claim of underpayment, issue 5.

Mast’s companion argument regarding the preclusive effect of the Board’s final decision is that, when the Board confirmed the validity of the settlement agreement, it also confirmed the calculations JRS had made prior to the discovery of its error in applying the 1987 cost-of-living adjustment. Those calculations, Mast insists, became a binding part of the parties’ settlement agreement; post-1997 recalculation of benefits to correct errors is not permitted. But this assertion, like Mast’s primary argument regarding the meaning of the Board’s final decision, is not supported by the language of the decision. Although it rejected JRS’s claim about overpayments, at no point did the Board indicate it agreed with Mast’s calculations of an underpayment of benefits or suggest that JRS was precluded from correcting errors that may have been made in calculating payments in accordance with the terms of the settlement agreement.

Simply put, the doctrine of issue preclusion has no role in this case.

2. The Superior Court Did Not Improperly Consider or Exclude Evidence

In concluding JRS had not underpaid Mast, the superior court relied on a declaration from Pamela Montgomery, dated November 30, 2017, which stated, “In 2010, I determined that the initial calculation that a JRS staff member prepared in 1996 had included an incorrect 9% increase for the cost of living in 1987. The true cost of living increase for that year was actually only

1.9%. While other errors had been made in the calculation of Mast's benefits over time, that error was by far the most significant and the errors resulted in net overpayments to Mast in excess of \$95,000 before the errors were corrected on a prospective basis." Montgomery's declaration constitutes substantial evidence supporting the superior court's decision that Mast was not entitled to any additional payments from JRS. (See Evid. Code, § 411 ["[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"]; *In re Marriage of Fregoso & Hernandez* (2016) 5 Cal.App.5th 698, 703 ["[t]he testimony of one witness, even that of a party, may constitute substantial evidence"].)

Mast contends the Montgomery declaration should not have been considered by the superior court because the issue of JRS's right to correct its mistake in using a 9 percent cost-of-living adjustment for 1987 had previously been determined by the Board. That argument, of course, is simply a restatement of Mast's erroneous issue preclusion claim.⁸

⁸ Although not mentioned in his opening brief, in his reply brief and again at oral argument Mast also argued JRS's correction in 2010 of a calculation error it had made in 1996 was prohibited by the three-year statute of limitations in Government Code section 20164, subdivision (b). That provision states in part, "For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, . . . the period of limitation of actions shall be three years, and shall be applied as follows: (1) In cases where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment. . . ." Nothing in this provision, which limits collection of past erroneous

Mast also argues the superior court improperly failed to consider his own declaration, filed January 30, 2017, the date set for the hearing on Mast's petition. Mast had previously submitted a declaration, dated October 20, 2017, with his opening brief and a second declaration, dated January 12, 2017, with his reply brief. Mast's January 30, 2017 declaration asserted no competent evidence had been presented in the administrative proceedings or in the superior court that JRS staff had inadvertently used a 9 percent figure, rather than 1.9 percent, in a cost-of-living adjustment: "The statement is the unsupported statement of Pamela Montgomery without any data or citation of where and when such an error was made." Mast asserted JRS's claim of computational error was false, identifying various cost-of-living figures that he explained were inconsistent with Montgomery's statement. Mast also insisted, once again, that this claim had been litigated and rejected in the administrative proceedings.

overpayments, precludes JRS from correcting past calculation errors on a purely prospective basis, as has occurred here. (See Gov. Code, § 20160, subd. (b) [requiring CalPERS Board to "correct all actions taken as a result of errors or omissions"]; cf. *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567 [although administrative board of public employee retirement system was estopped from retroactively reclassifying animal control officers who had been erroneously classified as local safety workers, the employees could be reclassified on a prospective basis]; *Krolikowski v. San Diego City Employees' Retirement System* (2018) 24 Cal.App.5th 537, 559 [because public pension board used its own internal administrative process to recoup overpayments, it was not subject to statute of limitations periods set forth in the Code of Civil Procedure].)

The minute order for the January 30, 2017 hearing states the court provided the parties with its written tentative ruling in open court, heard argument and ruled in accordance with its tentative ruling. Even assuming the court did not consider Mast’s January 30, 2017 declaration, nothing in the appellate record reflects the court’s reasons for excluding it. Under these circumstances we cannot conclude the court’s handling of the last minute declaration constituted an abuse of discretion. (See *Randall v. Mousseau* (2016) 2 Cal.App.5th 929, 935 [“Failure to provide an adequate record on an issue requires that the issue be resolved against appellant. [Citation.] Without a record, either by transcript or settled statement, a reviewing court must make all presumptions in favor of the validity of the judgment”].)

3. *The Superior Court Did Not Issue an Unauthorized Declaratory Judgment*

In his statement of the case, but not in the argument section of his opening brief, Mast describes his third cause of action for declaratory relief as limited to seeking a declaration as to the meaning of the Board’s final decision and contends, “The Cause of Action for Declaratory Relief limited the Superior Court to determining what CalPERS ordered in the Board’s Decision. [¶] There was no cause of action in the Petition for an *ab initio* Declaratory Relief proceeding.” This implicit challenge to the superior court’s declaratory judgment is predicated on a significant mischaracterization of Mast’s pleading.

In paragraph 32 of the third cause of action Mast alleged “[a]n actual controversy exists between Mast and the Judges’ Retirement System, Administered by CalPERS, as to whether JRS owes unpaid retirement benefits. . . .” JRS admitted that allegation. In paragraph 33 Mast “request[ed] a judicial

determination that unpaid retirement benefits are owed by JRS as alleged.” In its answer JRS stated no response was required to this paragraph. In his prayer for relief, Mast asked “[f]or a declaration, under Code of Civil Procedure § 1060, that the JRS and CalPERS were not authorized to disapprove the payment of unpaid retirement benefit funds to Mast, and that there is due to Mast pursuant to the Settlement Agreement entered into by the parties and as ordered by the Final Decision of the Board of CalPERS in an amount according to proof”

The superior court’s declaratory judgment responds directly, albeit negatively, to Mast’s request. The court determined that JRS was not precluded, by virtue of either the parties’ settlement agreement or the Board’s final decision, from disapproving Mast’s claim and that it did not owe him unpaid retirement benefits. That judgment was entirely proper. (See Code Civ. Proc., § 1060 [court’s declaration “may be either affirmative or negative in form and effect”].)

DISPOSITION

The judgment is affirmed. JRS is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

FEUER, J.